FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 19 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 650

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

and

HON. C. WILLIAM KRAFT, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ELWOOD S. LEVY,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia, Pennsylvania,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Rules Involved	3
Statement of the Case	8
Reasons for Granting the Writ	10
Argument	12
Introduction	12
I. The District Court's Order and the Local Rule Supporting It Are an Attempt to Exercise Jurisdiction Which That Court Does Not Have. They Violate the Seventh Amendment of the Constitution	13
II. The Local Rule and Order Are in Violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States	22
III. The Order of October 9, 1958, Violates Both Rule 35 and the Local Rule of June 2, 1958	25
Conclusion	29
Appendix:	
Memorandum and Order Sur Defendant's Motion For Impartial Medical Examination (Hankinson v. P.R.R. v. U.S.A., U.S.D.C., E.D. Pa., Civil Action No. 21,051)	1a
Order (Hankinson v. Van Dusen and Kraft, U.S.C.A.(3) No. 12,740)	4a
Affidavit	5a

TABLE OF CASES CITED.

	Page
Chemical Bank and Trust Co. v. Prudence-Bonds Corp., 207 F. 2d 67 (C. A. 2, 1953)	24
Duke Power Co. v. Greenwood County, 91 F. 2d 665 (C. A. 4, 1937)	25
Firtag v. Gendleman, 152 F. Supp. 226 (U. S. D. C., D. C.) (1957)	23
Hansen v. Bradley, 114 F. Supp. 382 (U. S. D. C., Md.) (1953)	24
Kenny v. The United States of America, 118 F. Supp. 907 (U. S. D. C., N. J.) (1954)	23, 24
La Buy v. Howes Leather Company, 352 U. S. 249, 77 S. Ct. 309 (1957)	12, 30
In re Peterson, 253 U. S. 300, 40 S. Ct. 543 (1920)	12, 18, 19, 21, 22, 24
Sibbach v. Wilson & Co., Inc., 312 U. S. 1, 61 S. Ct. 422 (1941)	11, 29
Specialty Equipment & Machinery Corp. v. Zell Motor Car Company, 193 F. 2d 515 (C. A. 4, 1952)	24
Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 S. Ct. 1000 (1891)	13
Washington-Southern Nav. Co. v. Baltimore & P. S. Co., 263 U. S. 629, 44 S. Ct. 220 (1924)	29

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Act of June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. Sec. 1254(1)	2
Constitution of the United States:	
Amendment V	3
Amendment VII	3, 20
The Daily Record, Baltimore, Maryland, p. 5 (June 22, 1957)	20
Federal Employers' Liability Act, Title 45 U. S. C. Sec. 51 et seq.	8
Federal Rules of Civil Procedure:	
Rule 35	3, 10, 11, 13, 14, 25, 26, 27, 28, 29
Rule 37	4, 13, 14
Rule 53	5, 11, 15, 16, 17, 22, 28
Rule 83	6, 14, 15, 17, 26, 28
Holtzoff, "A Judge Looks at the Rules After Fifteen Years of Use," 15 F. R. D. 155, 164	14
"Impartial Medical Testimony", Hon. David W. Peck, 22 F. R. D. 21, 23 (1958)	28
Rule, Supreme Court of New York County, Para. 2, id. p. 24	28
U. S. D. C., E. D. Pa. Rule for Medical Examination in Personal Injury Actions Adopted Pursuant to F. R. Civ. P. 83 and Supplementing F. R. Civ. P. 35	7

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No.

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

and

HON. C. WILLIAM KRAFT, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Arnold Hankinson, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on October 21, 1958.

OPINIONS BELOW.

No opinion was filed by the United States District Court for the Eastern District of Pennsylvania. A memorandum and order were filed October 9, 1958. No opinion was filed by the United States Court of Appeals for the Third Circuit on the order denying the petition for a writ of mandamus and/or prohibition.

JURISDICTION.

The order of the United States Court of Appeals for the Third Circuit was entered on October 21, 1958. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where, in a personal injury case, the medical issues are admittedly simple and sharply defined, and the case is neither special nor complicated, is not the appointment by the court after those simple issues have been defined, of "impartial" medical witnesses to testify at trial, an unwarranted invasion of the unobstructed right to trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States?

2. Did the District Court have the power to promulgate the local rule under which such appointment was made?

3. Where a local rule and order command a protesting litigant to undergo medical examinations by court appointed "impartial" medical experts on motion of his opponent, and to pay one-half of the medical fees for such examinations, is not such requirement a deprivation of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

4. Where a Federal Rule of Civil Procedure grants to a litigant an absolute and unqualified right, may the District Court purporting to act under such rule by its order condition such absolute right?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

1. Constitution of the United States, Amendment V:

"* * * nor shall any person . . . be deprived of . . . property, without due process of law . . ."

Constitution of the United States, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Federal Rules of Civil Procedure:

"RULE 35.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) *Order for Examination.* In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions.

After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition."

"RULE 37.

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

* * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it

to be done, or to permit entry upon land or other property, or on order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

* * *

"RULE 53.

MASTERS.

(a) *Appointment and Compensation.* Each district court with the concurrence of a majority of all the

judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

* * *

"RULE 83.

RULES BY DISTRICT COURTS.

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

3. Local Rule of the United States District Court for the Eastern District of Pennsylvania:

"RULE FOR MEDICAL EXAMINATION IN PERSONAL INJURY ACTIONS ADOPTED PURSUANT TO F. R. CIV. P. 83 AND SUPPLEMENTING F. R. CIV. P. 35.

A. In any personal injury case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing, if such hearing be requested by either counsel, order such examination and report. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with a committee appointed by the President of the Pennsylvania Bar Association and with the court. Copies of the report of the examining physicians will be made available to all parties.

B. The compensation of the expert or experts shall be fixed by the judge ordering the examination and shall be paid equally by each party to the litigation unless such judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations.

C. If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party, but without compensation by any litigant."

June 2, 1958.

STATEMENT OF THE CASE.

This is an action under the Federal Employers' Liability Act, Title 45 U. S. C. Sec. 51 et seq., to recover damages for injuries suffered by the petitioner July 30, 1955, while in the employ of The Pennsylvania Railroad Company as a mail handler. Suit on his behalf was instituted July 17, 1956, in the United States District Court for the Eastern District of Pennsylvania, being civil action No. 21051. Under the Federal Tort Claims Act the defendant, The Pennsylvania Railroad Company, brought on the record as third-party defendant the United States of America.

Petitioner claimed that as a result of the negligence of the railroad company, he sustained an avulsion fracture of the spinous process of the first sacral segment, a ruptured intervertebral disc and a traumatic heart attack. In the proceedings hereinafter referred to the fracture is not in dispute; the other two claimed injuries are disputed. By reason of his cardiac involvement, petitioner is totally disabled from his employment. He receives $51 monthly by way of disability pension from the Railroad Retirement Board.

In routine preparation for trial, counsel agreed to the mutual exchange of reports of examining physicians. Pursuant to such agreement petitioner delivered to The Pennsylvania Railroad Company three reports from his two treating physicians, along with copies of his charts of hospitalization. Petitioner also delivered to the railroad company his authorizations to enable the defendant below to examine his original hospital records. Defendant delivered to petitioner twenty-six medical reports and records from its clinic and from eleven doctors, including the reports of four doctors selected by defendant, who examined petitioner at the railroad company's request and with petitioner's consent. One of these examining physicians was an expert in cardiology and one was an expert in orthopedics.

On October 1, 1958, The Pennsylvania Railroad Company, defendant in the civil action, filed in the District Court its "Motion for Impartial Medical Examinations". This motion was filed pursuant to a local rule of the United States District Court for the Eastern District of Pennsylvania adopted June 2, 1958.

The motion was bottomed solely on the ground that petitioner's and defendant's orthopedists had opposite views on the question whether petitioner had suffered a herniated disc and that petitioner's and defendant's cardiologists had opposite views as to whether the accident in question had any connection with petitioner's subsequent heart attack. No other grounds for the grant of the motion were then or thereafter alleged.

After hearing held October 7, 1958, and over the objections of the petitioner (Transcript, pp. 2-4, 7) an order was entered in the said civil action on October 9, 1958, by the Hon. Francis L. Van Dusen and the Hon. C. William Kraft, Jr., which required the petitioner to submit within twenty days to examination by two designated allegedly "impartial" physicians, one each in the fields of orthopedics and cardiology. The named physicians were drawn by the said judges from a list of alleged "impartial" medical experts, which list has never been made public. The court found, and so stated in its order, that the petitioner was unable to afford one-half of the fees of such experts.

Paragraph 7 of the aforesaid order required that the petitioner, prior to distribution to his counsel of the reports, file with the Clerk of the District Court a stipulation agreeing to the payment to the movant defendant of fifty per cent of the said experts' fees out of any recovery obtained by petitioner.

On October 14, 1958, petitioner filed in the United States Court of Appeals for the Third Circuit his petition for the grant of a rule upon the Hon. Francis L. Van Dusen and the Hon. C. William Kraft, Jr. to show cause why peremptory writs of mandamus and prohibition should not issue out of that Court, requiring the aforesaid District Judges to

declare void the local rule of June 2, 1958, and to vacate and declare void the Order of October 9, 1958. Petitioner averred inter alia that the case sub judice in its medical aspects involved no more than simple, disputed factual issues. This averment was not denied.

On October 21, 1958, the said petition for writs of mandamus and prohibition was denied, without hearing and without opinion. This petition followed.

For the sake of completeness, petitioner's counsel for use in this petition sought of the United States District Court for the Eastern District of Pennsylvania, the facts as to the total number of "Motions for Impartial Medical Examination" filed with the said court since adoption of its local rule June 2, 1958, and the number of such motions granted. The Court declined to furnish such information. Petitioner's counsel can state, however, that in their own office, during the current fall trial period, such motions have been filed by opposing counsel in seven cases and have been granted in six cases with one motion pending (Appendix).

REASONS FOR GRANTING THE WRIT.

1. The immediate and unavoidable implications of the issues at bar reach into literally every civil jury litigation in the federal courts where the physical or mental condition of a litigant is in issue. It thus presents a dominating problem, the solution of which is ultimately the responsibility of this Court: the administration of justice throughout our federal courts.

2. The critically important problem involved in this case is whether, notwithstanding the dictates of the Seventh Amendment, United States District Courts may as a standing practice order what can only be intended to be the arbitration of simple, clearly defined issues by allegedly "impartial" experts appointed by the court in jury trials.

3. Rule 35, a pre-trial discovery rule, is one of the most frequently used Rules in our federal District Court. This

Court has never construed the Rule but only its constitutionality. *Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1, 61 S. Ct. 422 (1941). The case at bar presents several vital questions of construction of the limits of the Rule:

(a) Does the Rule authorize the appointment of "impartial" medical experts such as those appointed in this case after full medical discovery has been exhausted under the Rule?

(b) Does Rule 35 authorize the imposition of the costs of medical examinations by such court-appointed "impartial" medical experts on litigants other than the moving party?

(c) Does the Rule authorize the imposition of a portion of the fees on the prevailing party?

(d) Does the Rule authorize the imposition of such costs as a precondition to the disclosure to the party examined of the findings of such "impartial" medical experts?

4. The case at bar presents the important question of whether the appointment of "impartial" medical experts by the court with functions similar to those of a master may only be made under the strict standards imposed by Rule 53 of the Federal Rules of Civil Procedure.

5. The instant case presents the important problem whether the United States District Courts may promulgate local rules purporting to supplement existing federal rules on discovery, where all purposes of that existing rule have already been accomplished and the local rule relates not to discovery but rather to the use of the testimony of "impartial" experts at trial.

6. It involves a serious and important question of the power of the United States District Court to promulgate local rules where the subject to which the local rules relate has already been preempted by existing Federal Rules of Civil Procedure.

ARGUMENT.

Introduction.

Mandamus and prohibition are the proper remedies. Those writs lie to test the question whether the District Court has acted beyond the scope of the Federal Rules, and whether its action constitutes an unlawful deprivation of petitioner's right to trial by jury and a denial of due process of law. *In La Buy v. Howes Leather Company*, 352 U. S. 249, 256, 77 S. Ct. 309, 313 (1957), this Court held mandamus in such case to be the proper remedy and said:

> "As this Court pointed out in Los Angeles Brush Mfg. Corp. v. James, 1927, 272 U. S. 701, 706, 47 S. Ct. 286, 288, 71 L. Ed. 481: '• • • [W]here the subject concerns the enforcement of the • • • [r]ules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked."

Again in *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543 (1920), an objection to jurisdiction was made based upon the contention that mandamus and prohibition did not lie prior to trial and that therefore those writs were not the appropriate remedy. In that case this Court had before it the appointment of an auditor whose findings would ultimately be placed before a jury. This Court said per Mr. Justice Brandeis (253 U. S. at p. 305, 40 S. Ct. at p. 544):

> "• • • Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him, and his report should

be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex parte Simons, 247 U. S. 231, 239, 38 Sup. Ct. 497 (62 L. Ed. 1094) 'be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded . . ."

The above holdings conclusively demonstrate that mandamus and prohibition are indeed not only available but are the only appropriate remedies here.

I. The District Court's Order and the Local Rule Supporting It Are an Attempt to Exercise Jurisdiction Which That Court Does Not Have. They Violate the Seventh Amendment of the Constitution.

In actions such as this where the mental or physical condition of a party is in controversy, the Federal Rules of Civil Procedure empower the District Court, upon motion for good cause shown, to order a medical examination for such condition.

Unquestionably the purpose of Rule 35 is part of the larger pattern of pre-trial discovery under the Federal Rules, and the scheme of Rule 35 is simply to furnish the parties with a method for mutually disclosing certain medical information. The intent of the Rule was to open an area of pre-trial discovery that did not exist before its promulgation, *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 S. Ct. 1000 (1891). Federal Rule of Civil Procedure 37 also expressly discloses that Rule 35, which is treated

within Rule 37, is an integral part of the pre-trial and discovery aspect of the Federal Rules. Rule 37 is entitled: "Refusal to make discovery; consequences." It specifically deals with the failure to comply with an order made under Rule 35 requiring submission to a physical or mental examination [(Rule 37(b)(2))].

Conclusive of this purport of Rule 35 is the fact that the Fifth Division of the Federal Rules of Civil Procedure, in which Rule 35 is found, is entitled "Depositions and Discovery." See also Holtzoff, "A Judge Looks at the Rules After Fifteen Years of Use", 15 F. R. D. 155, 164.

The only aspect of Rule 35 linking the Rule and the actual trial of the cause is its sanctioning provision permitting the court to bar trial testimony by a non-compliant physician. Rule 37 has equivalent barring sanctions against a non-compliant party.

In the case at bar, the remedies afforded by Rule 35 have been completely exhausted and achieved. At the time the defendant Pennsylvania Railroad moved for the grant of the order under the local Rule, it had received all the medical reports in petitioner's possession and had examined petitioner by four doctors of its own choosing. Thus it had medical knowledge that was at least equivalent to that which petitioner had about his own condition.

It is therefore bluntly obvious that although it invoked Rule 35 in an effort to bottom its local rule, the District Court here was not in any legal or factual sense giving relief under Rule 35. That relief had already been totally accomplished in this case. The local rule must therefore look in some direction other than discovery.

The other Federal Rule of Civil Procedure pursuant to which the lower court announced its promulgation of the local rule is Rule 83.

There are no cases arising under Rule 83 whose facts remotely resembly those instantly. No cases have been found in which a federal court attempted to promulgate a local rule of court having the content and effect of the

rule at bar or the manifest consequences of the order sired by that rule.

Rule 83 contains the self-limiting provision that: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

What then are the local rule, and its consequent order, really attempting to do?

The gist of the remedy sought in the motion below is nothing less than, in effect, the arbitration by physicians of an issue as to which other physicians have in good faith[1] disagreed.

In this situation, the only relief conceivably authorized under the Federal Rules of Civil Procedure would have to be sourced in Rule 53. Consequently, if the District Court below had any jurisdiction to compel reference to the "impartial" physicians, it could only be founded in Rule 53.

The beginning and the end of this Petition, and the reason why its grant is urgently needed and justified, is that Rule 53 absolutely fails to invest the District Court with any power to do what it is seeking to do here. Failing any jurisdictional foundation, the order and whatever support it purportedly finds in the local rule are simply judicial commands by a court possessing no power to compel compliance with those commands.

Rule 53(b) provides in part as follows:

> "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . ."

The Appendix attached herewith indicates first of all that the new local rule below is swifty working itself out

1. Nowhere have movants below, or the District Court, ever suggested that the physicians here whose opinions are in disagreement are biased, corrupt, partial or professionally incompetent.

into a practice that unambiguously demonstrates that references to "impartial" medical experts are the rule rather than the exception in cases of conflicting medical facts. It appears that wherever there is a disputed issue of medical fact in a personal injury action, parties are increasingly moving the District Court for the appointment of "impartial" medical experts. If nothing else appeared in cases such as this, this pattern of growing frequency would clearly be a direct violation of the exceptional remedy available under Rule 53.

Beyond this, however, the violation is gravely compounded in this case, as in the cases in which the same relief has been sought in an analogous context, by the fact that it is not claimed, nor could it be, that the issues involved as to which reference is requested are complicated. Indeed, that is exactly what the issues are not. Neither the moving parties below nor the District Court ever suggested that they were. Neither the Court nor the moving parties below could make such a suggestion. As a matter of fact, the issues here are simple, and Paragraph 14 of the petition for the writs of mandamus and prohibition in the Court of Appeals averred exactly that.

The only reason that a reference is being sought is not because this is an exceptional case nor because it involves any complexity but solely because qualified doctors in good faith differ in their opinions as to the medical condition of the petitioner, and the court is seeking to have those differences of opinion arbitrated by an "impartial" expert. Indeed, the eighth paragraph of defendant railroad company's motion for the appointment of the "impartial" expressly grounds its application for relief in these words:

> "*In view of the diametrically opposed position taken by plaintiffs' and defendants' doctors,* impartial examinations of plaintiff and impartial reviews of the past medical history would be of material aid to the just determination of the case." (Italics supplied.)

It is nothing more than these differences of opinions that are sought to be used as a basis for the appointment of the "impartial" experts.

The operation of the local rule and the order are thus in direct conflict with Rule 53. But beyond the facts of this case, the local rule violates Rule 53 because it runs afoul of it in Rule 83 terms: the local rule is inconsistent with Rule 53.

Two vital criteria—the only criteria—for determining whether reference will lie are contained in Rule 53(b): (1) references are exceptional; (2) "In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . . ." Neither one of these criteria is embodied either in letter or spirit within the local rule. Instead, a fundamentally different criterion is asserted as the determinant for reference: if the judge is ". . . of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case . . ." As admirable as this generalized standard may be, it does not save the rule from being in fundamental conflict with Rule 53 nor does it create jurisdiction where none otherwise exists.

If they suffered from no other deficiencies of law, the order and its underlying local rule would thus be fatally defective, unsupported as they are by any jurisdiction and running afoul as they do of Federal Rules of Civil Procedure 53 and 83.

Standing alone these root defects justify the issuance of the Writ here.

But there is a second ground, separate and distinct from that just demonstrated, which would also nullify the order and supporting local rule. These commands of the District Court are damaging assaults on the preservation of the right to trial by jury vouchsafed by the Seventh Amendment of the Constitution of the United States.

To comprehend its unlawfulness and the impact that the order and local rule will necessarily have, we need only measure our case against this Court's reasons (which yield a contrary result to the one sought here) in *In re Peterson*, 253 U. S. 300, 40 S. Ct. 543 (1920).

There, on a petition for writs of mandamus and/or prohibition, petitioner challenged the District Court's appointment of an auditor whose instructions were (1) to segregate a great mass of items on business transactions upon which the parties agreed and to classify those in controversy in order to define the issues, and (2) to express an opinion as to those items in dispute.

Writing for the majority, Mr. Justice Brandeis made a sevenfold analysis of the problem. The last two of these seven subdivisions treated the fee aspects of the problem and are discussed *infra*. We turn now to the other five considerations and, treating them *seriatim*, we respectfully submit that the *ratio decidendi* of *Peterson* compels only one conclusion here: the Writ should issue.

First. Respondent there objected to the jurisdiction of this Court, urging that the auditor should prosecute his duties, trial should be had and plaintiff's exceptions should then be reviewed by the Circuit Court of Appeals. This Court rejected the contention and held that it had jurisdiction to adjudicate the petition. Exactly the same jurisdictional conclusion must be reached here.

Second. Tentatively assuming that if the District Court had power to appoint an auditor, the Court found that the facts in *Peterson* warranted the exercise of that power. In suit was plaintiff's claim for a balance due on an account containing 298 items. The defendant answered asserting another account containing 402 items arising out of 123 separate deliveries of coal on 91 different days during an eleven month period. The coal itself as well as the invoices varied in kind and prices differed for the same kind of coal.

Additional complicating factors are suggested in the *Peterson* opinion which we will not detail here.

Against this background of great complexity and a mass of undefined issues, this Court believed that the auditor's task of identifying, segregating and classifying matters both in agreement and in issue would shorten the trial of the case to a substantial degree.

The factual context present in *Peterson* is utterly missing here. Factual complexity in *Peterson* is absolutely displaced by stark simplicity. The issues in *Peterson* were unknown. The issues here were not only known but were actually identified by the party moving for the reference.

Finally the work of the auditor in *Peterson* would have compressed the time of trial. Here an antithetical result must occur: the time of this trial will dilate instead of contract, for where physicians would conventionally appear as witnesses for litigants on both sides, that will still occur here plus the appearances of two "impartials". It is impossible to understand how more witnesses than those conventionally used will shorten a trial over issues that are admittedly sharp and simple.

THIRD. In *Peterson* this Court traced the origin of the auditor and acknowledged at 253 U. S. 309, 40 S. Ct. 546: "No act of Congress has specifically authorized the adoption of the practice in the federal courts." The Court then framed the issues it had to resolve as whether the appointment of auditors was consistent with the constitutional right of trial by jury and also whether the District Court, as a trial court, had the inherent power to make such an appointment.

Of course, here the court appointees were not auditors but physicians. If there were no other distinction between this case and *Peterson* that would remain a profound one, for whatever limits may be put upon the field of inquiry of the auditor, the stuff of that inquiry is accounts. There one

and one is always two. Accounts are not medicine, and it is in the field of medicine with all of its unknowns and unfolding yet tentative experimental knowledge that the "impartial" experts here will have their trial impact.[2]

FOURTH. This Court said that the Seventh Amendment is not a command ". . . that old forms of practice and procedure be retained" (253 U. S. 309, 40 S. Ct. 546). Having said this, it then marked the rigorous limits of the Seventh Amendment within which new methods must operate to be valid:

> "The limitation imposed by the amendment is merely that enjoyment of the right to trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." (253 U. S. 310, 40 S. Ct. 546)

The Court then found that the appointment of the auditor did not breach those limits. He did not obstruct because his function of defining and simplifying the issues

---

2. In an address at the Twenty-Seventh Judicial Conference of the Fourth Circuit on June 8, 1957, Paul Berman, Esquire, of the Maryland Bar spoke as follows:

> "The essential flaw in the position of the proponents of the plan for impartial medical testimony is the fact that medicine is not an exact science, and medical opinions cannot be given with absolute mathematical certainty.
>
> "In the course of a symposium on 'The Doctor in Court—Expert Medical Testimony' conducted by the Medical and Chirurgical Faculty of Maryland, 13 Maryland Law Rev., p. 304 (1953), Dr. George O. Eaton, an eminent surgeon of the City of Baltimore, in discussing the 'Viewpoint of the Traumatic Surgeon' said:
>
> > 'Given exactly the same facts, even conscientious experts can and will disagree with regard to their significance and potentialities, so that the mere disagreement between experts does not imply dishonesty or incompetence on the part of one or both of them.'"

The Daily Record, Baltimore, Maryland, p. 5 (June 22, 1957).

is really the equivalent of that of pleading, and he did not unduly interfere with the ultimate determination of the issues because no incident of the trial is removed by the introduction of the auditor whose report is admissible in strong part because he is an officer of the court, subject to its supervision and his report may be used only if acceptable to the court.

Here it is simply inconceivable to equate the function of "impartial expert" with that of pleading. The simple, clear-cut issues were absolutely fixed before the "impartials" were appointed. The very core of this matter lies exactly at this point: *the "impartial experts" were appointed here not to define the issues but just because the issues were defined.*

Saying this with all the conviction at our command, we are also saying with the same conviction that the only purpose of which reason will admit for the appointment of the "impartial" is that the local rule and order intend exactly this: that the ultimate determination of these issues of fact by the jury shall be deeply and persuasively affected by the testimony of the "impartial". If in cases like this there is no claim of complexity, an actual *insistence* that the issues are sharply drawn, and no suggestion that physicians who have drawn these sharp issues are incompetent, corrupt or prejudiced, then what possible reason could a court have for imposing a rule and order like those at bar except to clothe a witness with something of the unique dignity and authority of the court's impartiality, so that his testimony will be accepted to the rejection or exclusion of those men—even his professional and moral peers or superiors—who disagree with him. This has the blunt impact of turning the "impartial" into a referee. This is nothing less than a great breach in the wall this Court built in *Peterson.*

FIFTH. Having found that Congress legislated no authority to the District Courts to make the order of appoint-

ment, the Court then inquired whether it had ". . . inherent power to supply itself with *this* instrument for the administration of justice when deemed by it essential." (253 U. S. 312, 40 S. Ct. 547, Italics supplied.)

The Court then cited a number of examples in *equity* cases, which aside from the fact that they were in equity, were otherwise distinguishable because in none of them was there anything factually akin to what is being attempted here. Then the Court concluded that the District Court was seeking the kind of aid that the chancellors sought in their equity cases.

But in saying that, this Court then swiftly and tightly hemmed in the situations at law where reference would lie, and those situations must meet essentially the identical and indispensable conditions that are now laid down in Federal Rule of Civil Procedure 53: they must be exceptional and they must be complicated. From the simple, sharply delineated facts that are now before this Court, it can see conclusively that this is absolutely not such a case.

Thus even if we concede *arguendo* that there is no Seventh Amendment disability here, the only law which could justify the extraordinary rule and order below is the *Peterson* rule controlling whether this is one of those exceptional areas where the federal trial court has the inherent power to do what is sought to be done here. The indispensable preconditions laid down by that rule are totally absent. Thus there is no inherent power to invest jurisdiction on the District Court below. Its order and supporting rule must be unlawful.

II. The Local Rule and Order Are in Violation of the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

Promulgated against this backdrop of lack of power, and in complete disregard of or with a failure to recognize the complicated and exceptional situation necessary under

Rule 53 for the appointment of a master, the local rule provides for an unconstitutional division between the litigants of the fees to be paid to the doctor. The rule requires that each litigant shall pay one-half of the compensation to the doctors without that litigant's agreement.

It is petitioner's position that this portion of the rule is undoubtedly unconstitutional in that it deprives him of property—the fees he must pay—without due process of law in violation of the Fifth Amendment of the Constitution of the United States. By judicial fiat the rule deprives petitioner, and indeed, any litigant, of one-half of an undetermined amount without any judicial determination that he owes such amount. It makes a litigant pay a doctor an undetermined amount without a hearing, without the production of evidence and without any opportunity to the litigant to prove that he should not pay for an examination he never requested, and indeed, opposed. Under the rule as expressed by the order in this case, litigants are simply not given an opportunity to be prepared fully to try an uncomplicated issue of their case without agreeing to pay this indeterminate amount.

As a matter of fact, the rule is actually a pre-trial imposition of costs regardless of the results of the trial. If it is construed as a rule of costs, it is unconstitutional in that it is beyond the power of the court in two respects.

First: It imposes costs which a court cannot under its powers tax.

Second: It divides such costs in a manner repugnant to the lawful division of costs under the existing law.

In truth, prior to trial the rule imposes on the litigant one-half the costs of an expert examination. These costs could not even be taxed against the unsuccessful party after trial. The amount spent for the testimony of an expert witness is not taxable as costs. *Firtag v. Gendleman*, 152 F. Supp. 226 (U. S. D. C., D. C.) (1957); *Kenny v. The United States of America*, 118 F. Supp. 907 (U. S. D. C.,

N. J.) (1954). See *Hansen v. Bradley* 114 F. Supp. 382 (U. S. D. C., Md.) (1953).

It has been held that even though the testimony is such that the court is enlightened, the fee for such testimony is not taxable as costs under any equitable doctrine. In *Specialty Equipment & Machinery Corp. v. Zell Motor Car Company*, 193 F. 2d 515, 521 (C. A. 4, 1952), the Court said:

> "* * * The fact that the court is enlightened by certain evidence is not such an exceptional circumstance as to justify the taxation in the costs of the expense of procuring that evidence . . ."

Furthermore, it imposes these costs against even the prospective prevailing party.[9] The imposition of costs on the prevailing party is without authority in law. This Court said (per Mr. Justice Brandeis) *In re Peterson*, 253 U. S. 300, 317, 40 S. Ct. 543, 549 (1919):

> "* * * The further question is whether the District Court had power to make the expense of the auditor taxable in whole or in part against the prevailing party, if the trial judge should so determine. The advantages of such a flexible rule are obvious. But general principles governing the taxation of costs in actions at law followed by the federal courts since their organization, preclude its adoption.
>
> While in equity proceedings the allowance and imposition of costs is, unless controlled by statute or rule of court, a matter of discretion, it has been uniformly held that in actions at law the prevailing party is entitled to costs as of right (compare United States v. Schurtz, 102 U. S. 378, 407, 26 L. Ed. 167, 219), except in those few cases where by express statutory provision or by established principles costs are denied . . ."

See also *Chemical Bank and Trust Co. v. Prudence-Bonds Corp.*, 207 F. 2d 67, 77 (C. A. 2, 1953); *Duke Power*

Co. v. Greenwood County, 91 F. 2d 665, 677-678 (C. A. 4, 1937).

It has thus been demonstrated that one-half of the cost of this medical examination cannot be indiscriminately taxed against the petitioner under the existing law. If this be so, then the rule providing for the payment of one-half of the fee by a litigant who never requested the appointment and without a hearing and even though he prevails, is without authority in law and deprives petitioner of property without due process of law.

III. The Order of October 9, 1958, Violates Both Rule 35 and the Local Rule of June 2, 1958.

Assuming pro arguendo that the local rule is valid and that the District Court has the power to assess one-half of the medical examiners' fees against each party, or in the alternative to require the plaintiff to stipulate to pay one-half of such fees out of any recovery, we nevertheless submit that paragraph 7 of the order of October 9, 1958, contravenes both Rule 35 and the local rule and is therefore void.

Rule 83 of the Federal Rules of Civil Procedure provides that:

> "Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 35 of the Federal Rules of Civil Procedure, relating to medical examinations, provides in part:

> "b. Report of Findings.
>
> (1) If requested by the person examined, the party causing the examination to be made shall

deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions."

The local Rule of June 2, 1958, provides in part:

"Copies of the report of the examining physicians will be made available to all parties."

Paragraph 7 of the Order of October 9, 1958, provides:

"The plaintiff shall, prior to the distribution to counsel of copies of the aforesaid reports, file with the Clerk of this court a written stipulation that fifty per cent of the aforesaid doctors' fees shall be paid to the movant defendant from any amount the plaintiff recovers in this action."

To the extent that the order of October 9, 1958, requires the plaintiff to file a stipulation to pay one-half the fees as a condition precedent to access to the medical examiners' reports, it clearly violates Rule 35, which entitles him to copies of reports merely on request, and additionally violates even the local rule under which it purports to be entered, which itself provides that such reports shall be made available to all parties, without the imposition of any conditions or restrictions whatsoever.

The purport of the order is clear. If plaintiff declines to yield to the compulsion of filing in advance an agreement to pay one-half the physicians' fees, he is deprived of access to the reports. His preparation for trial is thus seriously handicapped. Indeed, his ability properly to prepare for cross-examination of the impartial expert is effectively destroyed.

It is this "no pay, no see" requirement which is completely proscribed by Rule 35 read in the light of Rule 83. The unconditioned availability of reports, which is supposedly insured by Rule 35, serves an obvious purpose within the discovery framework of the Federal Rules: to

fairly and properly place the parties in equal status as to access to medical information. But what this order does is precisely the opposite. It places a premium on the one hand on ability to pay and lays a penalty on the other upon an impoverished plaintiff or one who declines to execute a stipulation or agreement under compulsion. It fosters inequality rather than equality. Under the guise of reform it delivers to the defendant railroad a significant advantage and simultaneously places the plaintiff under a serious handicap.

It takes away an unqualified right given the plaintiff by Rule 35 and fetters it with a condition nowhere authorized by the Rules. It then compounds this inequity by requiring the plaintiff who did not ask for the examinations to pay one-half the fees even if he wins.

It has been the unvarying practice under Rule 35 that the moving party pay the fees of the examining physicians.[3] Under that practice the choice whether to incur any such expense was exclusively and properly the defendant's. Under the order here involved the defendant, by filing its motion (and this without any showing whatsoever that it lacks medical information as to the plaintiff's condition) simply relieves its own exchequer of the payment of one-half the fees it would ordinarily bear, comforted by the court's ordering the plaintiff to pay the balance, and this without any agreement on the plaintiff's part to any such payment and without any adjudication of his liability therefor.

But the order in the instant case goes even beyond that. What it says is that if you are impoverished, you cannot have access to the findings of the impartial examiner unless you agree in advance to pay one-half his fees, and if you decline so to agree we are not concerned that thereby we have taken away from you a right granted by Rule 35;

3. Careful research has not disclosed a single case imposing on the plaintiff any portion of the fees of a physical or mental examination conducted at defendant's request.

we are not concerned that the result condones partiality and that thereby we convert adversary proceedings, with full disclosure, into ex parte proceedings with non-disclosure.

We submit that under Rule 83 this order violates not only the express terms of Rule 35 but offends and destroys the entire wholesome and salutary purpose of the modern Federal Rules of Civil Procedure, i.e., to effect as nearly and as fairly as possible an equality of position with respect to access to proof. This order places the stamp of judicial approval on inequality of access, an inequality itself judicially created. Even in New York, where the impartial medical plan has received its greatest impetus, no conditions precedent are imposed upon counsel's access to the examiners' reports ["Impartial Medical Testimony", Hon. David W. Peck, 22 F. R. D. 21, 23 (1958)]; Para. 2, Rule, Supreme Court of New York County, id. p. 24.

Rule 53, authorizing references to a "master", "referee" or "examiner", expressly provides that their report cannot be retained as security for payment:

> "a. Appointment and Compensation. . . . The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

Here it is the court not the examiner which insists on retaining the report, undisclosed to the plaintiff, as security unless and until plaintiff agrees to pay fifty per cent of the fee, ultimate payment to be made only in the event plaintiff prevails. How can it be said that such procedure "would be of material aid to the just determination of the case" (local rule of June 2, 1958) when the court below bars the injured plaintiff from free access to the reports unless he agrees in advance to give up an undisclosed amount of his recovery!

It is no answer that precedent for this requirement may be found under Rule 53, under which the master's compensation may be charged upon the parties, and that therefore the instant order is proper. This case is not within Rule 53. Furthermore, granting that the Rules of Civil Procedure, promulgated by the Supreme Court pursuant to Congressional authority, have the force of statute [*Sibbach v. Wilson & Co., Inc.*, 312 U. S. 1, 61 S. Ct. 422 (1941)], there is no such "legislation" by way of Rule 35 imposing any part of the examiners' fees on the plaintiff. If the present order is inconsistent with Rule 35, as we submit it clearly to be, and is in express terms prohibited by Rule 53, then the order is self-born, derives its authority from no lawful source and amounts to no more than an attempt at judicial legislation. It is elemental that the District Court has no such power. Cf. *Washington-Southern Nav. Co. v. Baltimore & P. S. Co.*, 263 U. S. 629, 635, 44 S. Ct. 220, 222 (1924).

Rule 35 grants plaintiff an unqualified, unrestricted and unconditional right to reports of medical examinations ordered on motion. By its order, the District Court emasculates that right. We submit that it is without power to perform such radical surgery.

CONCLUSION.

In the setting of an admittedly uncomplicated case where simple issues had been sharply drawn, the District Court here invoked its new local rule and issued an order which was nothing more than a reference to two court-designated "impartial" medical experts to, in effect, arbitrate as "impartial" trial witnesses those simple issues drawn by litigants' physicians as to whom neither the District Court nor the movants alleged or found incompetence or partiality. The basis for the imposition of the rule and order was that reference was to be had solely because there were exactly identified, simple issues. As an integral part of the reference the Court imposed on this protesting

petitioner the requirement that he stipulate to pay one-half the fees of these "impartial" arbiters out of any recovery he might achieve in the litigation as a condition precedent to his being informed of the "impartial" arbiters' findings.

There is absolutely no authority for this remarkable rule and order in the Federal Rules of Civil Procedure, notwithstanding the District Court's invocation of Rules 35 and 83. It falls closest to the remedy of Rule 53, but even there the case's admitted simplicity and the growing frequency with which this procedure is being applied in the District are in direct conflict with those essential preconditions which must be satisfied before Rule 53 may operate: the case must be complicated and reference must be exceptional. Those same preconditions, absent here, must exist before the doctrine of inherent power can be invoked to invest jurisdiction.

Fatally defective in jurisdictional support, the rule and order are also in direct violation of the Fifth and Seventh Amendments of the United States Constitution.

The issues in the case at bar raise questions of first impression. They are questions of commanding importance because they reach deeply into a vital area of the judicial administration of civil jury trials in every federal court in the nation.

So far as is known, the local rule and its consequent order represent the first instance in any federal court where this extraordinary procedure has been attempted. The potential that it will swiftly be installed in other United States District Courts throughout the nation is real and great. "... [E]ven 'a little cloud may bring a flood's downpour' if we approve the practice here indulged, particularly in the face of presently congested dockets, increased filings, and more extended trials." (per Mr. Justice Clark in *LaBuy v. Howes Leather Company*, 352 U.S. 249, 258, 77 S. Ct. 309, 315 [1957]). Justifiably concerned as it is with the massive modern problem of court congestion and delayed justice in the federal courts, this Court is the eminently

appropriate forum in which this supposed reform should be scrutinized.

Possible reform must first be lawful reform, and if even the most admirably intentioned judicial innovations destroy fundamental rights, and have no source in any existing jurisdiction, they cannot stand.

If the local rule and order at bar sought a method for relieving congestion by supposedly foreshortening trial time, they will accomplish a contrary result. On these facts more rather than fewer witnesses will appear at trial.

But even if this were not the practical result of the rule and order, the diminution of trial time is not the coin which will purchase shrunken constitutional guarantees, nor local court rules and resulting orders that arise where no jurisdiction exists to support them. That is the fundamental wrong in this case and in the untold number of cases which will receive the same unlawful treatment unless the wrong is barred now. The Writ should issue.

Respectfully submitted,

ELWOOD S. LEVY,
CHARLES A. LORD,
SEYMOUR I. TOLL,
Counsel for Petitioner.

RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia, Pennsylvania,
Of Counsel.

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

ARNOLD HANKINSON

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant and Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant.

Civil Action
No. 21,051.

Filed October 9, 1958.

MEMORANDUM AND ORDER SUR DEFENDANT'S MOTION FOR IMPARTIAL MEDICAL EXAMINATION.

MEMORANDUM.

Notice of the hearing on defendant's motion was given to the offices of counsel for plaintiff and for defendant on Saturday morning, October 4, 1958. Upon hearing held October 7, 1958, counsel for the third-party defendant orally joined in the defendant's motion. The plaintiff objected to the grant of the motion and assigned as reasons that (1) the local Rule invoked was an invalid exercise of the rule-making power of this court; (2) the grant of the motion might impose costs and/or fees upon the plaintiff and so be

a denial of due process; (3) a quasi-judicial status would be attributed by the jury to impartial medical experts appointed by the court, if such experts were called and testified; (4) there is no such thing as an impartial medical witness; (5) defendant's motion was filed too late.

Plaintiff's supplemental letter dated October 7, 1958, and received October 8, 1958, has been placed in the Clerk's file.

ORDER SUR DEFENDANT'S MOTION FOR IMPARTIAL MEDICAL EXAMINATION.

AND NOW, October 9, 1958, after hearing upon defendant's motion under F. R. Civ. P. 35 and local Rule dated 6/2/58 for physical examination of plaintiff by impartial medical experts, the court finds that (1) such examinations and reports thereon would be of material aid to the just determination of the case, and (2) the plaintiff cannot presently afford to pay one-half of the fee of such impartial medical experts, and it is ORDERED that:

1. Dr. Z. B. Friedenberg and Dr. C. F. Kay are appointed as impartial medical experts in this case.

2. The plaintiff shall, within twenty days, submit himself to Dr. Z. B. Friedenberg for examination with respect to his alleged "ruptured intervertebral disc."

3. The plaintiff shall, within twenty days, submit himself to Dr. C. F. Kay for examination with respect to his alleged "traumatic heart attack" and the alleged connection between plaintiff's alleged accident on July 30, 1955, and his present heart condition.

4. Plaintiff's, defendant's and third-party defendant's counsel shall make or cause to be made available to Dr. Friedenberg all prior medical reports and x-rays relating to plaintiff's alleged disc condition and shall make or cause to be made available to Dr. Kay all prior medical reports, cardiograms, x-rays and the like concerning plaintiff's alleged heart condition.

5. Each doctor shall, within forty-five days, file copies of his report with the Clerk of this court.

6. The Pennsylvania Railroad Company, as moving party, shall, prior to the distribution to counsel of the copies of the aforesaid reports, pay into the registry of this court such doctors' fees as shall be fixed by the court.

7. The plaintiff shall, prior to the distribution to counsel of copies of the aforesaid reports, file with the Clerk of this court a written stipulation that fifty per cent. of the aforesaid doctors' fees shall be paid to the movant defendant from any amount the plaintiff recovers in this action.

8. This case now appearing on the trial list for the three-week civil trial term beginning October 13, neither of the aforesaid doctors shall be called as witnesses at the trial pursuant to paragraph C of the aforesaid local Rule of Court, if the case is tried at the trial terms beginning October 13 and ending October 31, 1958, in view of the lateness of defendant's motion filed October 1, 1958.

9. Plaintiff's objections, insofar as they are applicable to this order, are overruled.

/s/ Francis L. Van Dusen, *J.*
C. William Kraft, Jr., *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,740

ARNOLD HANKINSON,
Petitioner.

v.

HONORABLE FRANCIS L. VAN DUSEN

AND

HONORABLE C. WILLIAM KRAFT, JR.,
Respondents.

Present: MARIS, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Upon consideration of the petition for writs of mandamus and prohibition in the above-entitled matter.

It is ORDERED that the petition be, and it is hereby denied.

By THE COURT,

ALBERT B. MARIS,
Circuit Judge.

October 21, 1958.

Received & Filed
Oct. 21, 1958.
Ida O. Creskoff,
Clerk.

AFFIDAVIT.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

ELWOOD S. LEVY, being duly sworn according to law, deposes and says that he is of counsel for the petitioner, that for informational use in the preparation of the within Petition for writ of certiorari in the matter of Arnold Hankinson, Petitioner, v. Hon. Francis L. Van Dusen and Hon. C. William Kraft, Jr., he requested of the District Court for the Eastern District of Pennsylvania that that Court make available to him the information as to the total number of "Motions for Impartial Medical Examinations" filed pursuant to its local rule of June 2, 1958, up to the present time and of the number of such motions granted, but was advised by the Clerk of the said Court who stated that he was acting by direction of the Court that the Court declined to furnish such information. Deponent further avers that in cases presently pending and in which the plaintiffs are represented by the firm of Richter, Lord & Levy, of which firm deponent is a member, "Motions for Impartial Medical Examinations" pursuant to the aforesaid local rule of June 2, 1958, were filed by opposing counsel in the cases now pending in the United States District Court for the Eastern District of Pe. ylvania as set forth in the below list and that said motions were disposed of as indicated:

Caption	Civil Action No.	Disposition	Date of order
Hankinson v. P. R. R.	21051	Granted	October 9, 1958
Ferrer v. P. R. R.	22392	Granted	October 10, 1958
Summers v. P. R. R.	23205	Granted	January 8, 1959
Glunt v. P. R. R.	22390	Granted	November 7, 1958
Wolfe v. P. R. R.	22393	Granted	December 15, 1958
Dunning v. P. R. R.	22383	Granted	December 15, 1958
Laudenslager v. P. R. R.	23065	Pending	

/s/ Elwood S. Levy,
Elwood S. Levy.

Sworn to and subscribed before me this 14th day of January, 1959.

Nancy Shaw,
(Seal) Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires February 2, 1961.

13

LE COPY

Office Supreme Court, U.S.
FILED
FEB 14 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 650.

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

and

HON. C. WILLIAM KRAFT, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

BERNARD G. SEGAL,
EDWARD W. MULLINIX,
1719 Packard Building,
Philadelphia 2, Pennsylvania,
Counsel for Respondents.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 650.

ARNOLD HANKINSON,

Petitioner,

v.

HON. FRANCIS L. VAN DUSEN

AND

HON. C. WILLIAM KRAFT, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

Did the Court of Appeals abuse its discretion in denying a petition for mandamus and prohibition by which the plaintiff in a personal injury case sought review of an interlocutory order appointing impartial medical experts to examine the plaintiff pursuant to a local rule of the District Court?

STATUTE AND RULE INVOLVED.

The case involves the discretionary power of the Court of Appeals under the All Writs Act, Section 1651(a) of the Judicial Code, 62 Stat. 944 (1948), as amended, 63 Stat. 102 (1949), 28 U. S. C. § 1651(a) (1952), which provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The petition for mandamus and prohibition which was denied by the Court of Appeals sought to question preliminarily the validity of a local rule of the United States District Court for the Eastern District of Pennsylvania, adopted June 2, 1958, the text of which appears at page 7 of the petition for certiorari.

STATEMENT OF THE CASE.

The present petitioner filed in the United States Court of Appeals for the Third Circuit a petition for writs of mandamus and prohibition alleging that he was the plaintiff in an action claiming damages for personal injuries consisting, inter alia, of a ruptured intervertebral disc and a traumatic heart attack. Petitioner has conceded that the opinions of the respective doctors retained by the parties to the action are "diametrically opposed" to each other as to the existence of medical conditions and as to the causal connection between certain admitted conditions and the accident (Motion for Impartial Medical Examination ¶¶ 4-8, and Transcript of Hearing, Oct. 7, 1958, pp. 4-5; also Petition for Mandamus ¶ 2).

The petition for mandamus further alleged that on motion of the defendant, the Pennsylvania Railroad Com-

pany, joined in by the United States as third-party defendant, the respondents, District Judges Van Dusen and Kraft, had entered an order appointing two impartial medical experts to examine plaintiff, one with respect to his alleged ruptured disc and the other with respect to his alleged traumatic heart attack (Petition for Mandamus, ¶¶ 5, 7; Order of Oct. 9, 1958 ¶¶ 2, 3). The order, in its preamble, contained a finding (made after a full hearing, the transcript of which is part of the record certified here) that "such examinations and reports thereon would be of material aid to the just determination of the case".

The order was entered pursuant to a local rule of the District Court, adopted June 2, 1958, authorizing any judge of the Court in a personal injury case to appoint an impartial medical expert or experts chosen from a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with the Court and with a Committee appointed by the President of the Pennsylvania Bar Association.[1] The rule provides that the compensation of the experts so appointed shall be paid equally by each party to the litigation unless the judge, in his discretion, orders payment to be made otherwise in order to meet special

1. The Medical Society of the State of Pennsylvania has requested that the composition of the panel not be made public because the Society felt that to do so would engender misunderstandings among members of the medical profession over the noninclusion of particular doctors in a panel which must necessarily be kept within reasonable limits. In practice, the District Court submits to the parties the name of the doctor selected and ascertains whether there is any objection to him. In the case at bar, one of the doctors initially selected by respondents was objected to by petitioner on the ground that he had done work in the past for certain defendants, and the next doctor in the panel was accordingly selected. The Court then afforded the parties additional opportunity, after investigation, to make any objection they might find to either of the doctors who had been tentatively selected. No objection was made (Transcript of Hearing, Oct. 7, 1958, pp. 9-11, 13).

factual situations. Under the rule, either party, or the trial judge, may call the examining physician or physicians to testify at the trial.

The order here involved contained an additional finding that plaintiff could not presently afford to pay one-half of the fees of the impartial medical experts and accordingly provided (¶¶ 6, 7) that the defendant should pay the total fees subject to reimbursement of fifty percent thereof by plaintiff out of any recovery by him in the action. The order directed that a stipulation providing for such reimbursement be filed by the parties before distribution to counsel of the reports of the impartial experts.

The petition for mandamus and prohibition alleged that both the order and the District Court's rule on which it was based are unlawful and unconstitutional on the grounds: (1) that if the findings of the impartial experts were introduced into evidence at the trial the jury would "undoubtedly" give "undue weight" to them and that this would result in denial of petitioner's right to trial by jury; (2) that the requirement that petitioner pay his share of the experts' fees out of any recovery in the action deprived him of property without due process of law; and (3) that the requirement that a stipulation be filed before distribution of the experts' reports to counsel violated Rule 35(b)(1) of the Federal Rules of Civil Procedure (which requires a party causing a physical or mental examination to be made to furnish a copy of a written report of the examination upon request of the party examined).[2]

---

2. The petition for certiorari (pp. 9, 11, 26) contains the misleading suggestion that petitioner's counsel, but not defendant's counsel, may be deprived of the impartial experts' reports. Respondents' order of October 9, 1958 is clear, however, in its requirement (¶ 7) that petitioner shall stipulate, to pay his share of the fees out of any recovery, "prior to the distribution to counsel of copies of the aforesaid reports"—*i.e.*, prior to their distribution to counsel for any of the parties. Similarly, distribution to any counsel of copies of the reports may not be made until after the defendant pays into Court the amount of the impartial medical experts' fees (¶ 6).

The petition sought issuance of a writ to the respondent judges requiring them to revoke the local rule of June 2, 1958 and to vacate their order for examination of petitioner by impartial medical experts.

The Court below (Maris, McLaughlin and Hastie, *JJ.*) denied the petition.

ARGUMENT.

Respondents do not doubt the **power** of the Court of Appeals to review on mandamus or prohibition the questions sought to be raised by petitioner. **LaBuy v. Howes Leather Co.**, 352 U. S. 249 (1957), and **Ex parte Peterson**, 253 U. S. 300 (1920), cited by petitioner, do no more than establish the now-settled proposition that such power exists.

What petitioner overlooks completely is that review through the device of a prerogative writ is a **discretionary** matter. As Mr. Chief Justice Stone stated in **Roche v. Evaporated Milk Ass'n**, 319 U. S. 21, 25 (1943), in considering the power of the courts of appeals to issue writs of mandamus and prohibition:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. * * *"

See also **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. at 260; **Parr v. United States**, 351 U. S. 513, 520 (1956); **Ex parte Peru**, 318 U. S. 578, 584 (1943); 6 **Moore, Federal Practice** 91 (2d ed. 1955).

The discretionary power is, moreover, a power to be exercised "sparingly", so as not to thwart the firm policy against piecemeal appeals. **Parr v. United States**, *supra*, 351 U. S. at 520. And, as Mr. Justice Jackson so forcefully stated in **Ex parte Fahey**, 332 U. S. 258, 259-260 (1947):

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."

In the case at bar, even if it be assumed that there were some merit in petitioner's challenge of the local rule for impartial medical examination or of its application to him, it was clearly within the discretion of the Court of Appeals for the Third Circuit, as the Court having the immediate responsibility for supervision over the District Court of which respondents are members [see **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. at 259-260], to conclude that petitioner's challenge will be more appropriately presented on appeal from a final judgment in his case if it then appears that he is aggrieved either by the final judgment[3] or by operation of respondents' order requiring him to reimburse the defendant for petitioner's share of the impartial experts' fees.[4]

The scope of the discretion allowed the courts of appeals in denying resort to the peremptory writs is reflected by this

3. One such appeal to the Court of Appeals for the Third Circuit is now pending, from a judgment for the defendant in the case of **Porta v. Pennsylvania R. R.**, Civil Action No. 21,293 (E. D. Pa.; notice of appeal filed January 15, 1959), where an impartial medical expert was appointed and testified at the trial over the objection of the plaintiff. In the case at bar, there are many potentialities under which the appointment of the impartial medical experts will not result in any conceivable prejudice to petitioner—*e.g.*, their reports may be favorable to petitioner; the case may be settled (possibly as a result of the effect of the impartial reports in helping to reconcile the present differences between the parties' respective experts); or, in any event, the impartial experts may not be called to testify at the trial.

4. Insofar as petitioner seeks to challenge any matter concerning payment of the impartial experts' fees, mandamus is clearly inappropriate under this Court's holding in **Ex parte Peterson**, 253 U. S. 300, 319 (1920), that even though an order as to costs was erroneous as a matter of law, such an error did not require remedy by mandamus or prohibition since it could be corrected on appeal from final judgment in the case. (The costs order in **Peterson** was erroneous under the doctrine that no costs may be taxed against the prevailing party in an action at law—a doctrine no longer applicable in the federal courts in view of the express provision in Fed. R. Civ. P. 54(d) that the Court may direct the allowance of costs otherwise than to the prevailing party.)

Court's action in recent years in consistently denying petitions for certiorari seeking review of such denials: **Great Northern Ry. v. Hyde**, 355 U. S. 872 (1957); **James Nasser Productions, Inc. v. Clarke**, 353 U. S. 957 (1957); **In re Narragansett Pier Amusement Corp.**, 350 U. S. 862 (1955);[5] **Fannin v. Jones**, 351 U. S. 938 (1956); **Berkshiser v. Jones**, 351 U. S. 938 (1956); **Vaughan v. Miller**, 349 U. S. 920 (1955); **Radio Corp. v. Igoe**, 348 U. S. 968 (1954).

The foregoing conclusions are not altered by petitioner's strained and disingenuous efforts (most of which are being made for the first time in this Court) to analogize the present situation to cases involving references to a master or the right to jury trial. No such question is here involved. In the final analysis, the District Court of which respondents are members has simply adopted a rule formalizing a procedure under which the Court may exercise its unquestionable right to call its own witness [9 **Wigmore, Evidence** § 2484 (3d ed. 1940)] in the type of case where most thoughtful observers have long recognized the desirability of such a procedure.[6] As Professor Wigmore said (*id.* at 270):

---

5. As appears from the opinion of the Court of Appeals in the **Narragansett Pier** case, 224 F. 2d 231 (1st Cir. 1955), that was a case in which parties to antitrust litigation sought mandamus to review the action of a district judge in referring the litigation to a master—a situation substantially similar to that in **LaBuy v. Howes Leather Co.**, *supra*, 352 U. S. 249, where this Court granted certiorari and affirmed a Court of Appeals' grant of mandamus to invalidate such a reference. This Court's refusal to interfere with the denial of mandamus in the similar situation in **Narragansett Pier** demonstrates that the Court will not, except in extraordinary circumstances, interfere with the exercise of the discretion of a Court of Appeals in denying mandamus.

6. See, *e.g.*, **Impartial Medical Testimony** (A Report by a Special Committee of the Association of the Bar of the City of New York) (Macmillan, 1956); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 So. Calif. L. Rev. 195 (1956); Peck, *Impartial Medical Testimony, A Way to Better and Quicker Justice*, 22 F. R. D. 21 (1958).

"The appointment of disinterested *expert witnesses* by the Court is one of the expedients employed for reforming the defects of the partisan system of providing such testimony."

The wide recognition of the clear propriety of such a procedure is implicit in the multitude of statutes and rules, in both England and the United States, providing for court-appointed experts [see 2 **Wigmore, Evidence** § 563 n.7 (3d ed. 1940) for a collection of such provisions] and in the use of impartial medical testimony in other federal district courts without any specific local rule of court. See also Rule 28 of the Federal Rules of Criminal Procedure, confirming the general power of the Court in a criminal case to appoint expert witnesses.

CONCLUSION.

The petition for certiorari should be denied.

BERNARD G. SEGAL,
EDWARD W. MULLINIX,
Counsel for Respondents.

February 16, 1959.

FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 18 1959
JAMES R. BROWNING, Clerk

No. 650

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD HANKINSON, PETITIONER

v.

HON. FRANCIS L. VAN DUSEN AND
HON. C. WILLIAM KRAFT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
LIONEL KESTENBAUM,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	5
Argument	9
Conclusion	17
Appendix:	
Motion of Pennsylvania Railroad for impartial medical examinations, filed October 1, 1958	18
District Court opinion sustaining United States motion to dismiss amended complaint, filed March 13, 1958	20
District Court order dismissing amended complaint against United States, filed March 13, 1958	23

CITATIONS

Cases:	
Bankers Life & Cas. Co. v. *Holland*, 346 U.S. 379	10, 11
Bank Line v. *United States*, 163 F. 2d 133	11
Bowen Motor Coaches v. *New York Casualty Co.*, 139 F. 2d 332	15
Bowles v. *Commercial Casualty Co.*, 107 F. 2d 169	10
Chalmette Petroleum Corp. v. *Chalmette Oil Distributing Co.*, 143 F. 2d 826	13
Cogen v. *United States*, 278 U. S. 221	10
Dinsel v. *Pennsylvania Railroad Company*, 144 F. Supp. 880	13
Dyker Bldg. Co. v. *United States*, 182 F. 2d 85	15, 16
Glasser v. *United States*, 315 U.S. 60	13
Italia, The, 27 F. Supp. 785	12
Johnson v. *United States*, 333 U.S. 46	13, 15
La Buy v. *Howes Leather Co.*, 352 U.S. 249	11
Leach v. *Greif Bros. Cooperage Corp.*, 2 F.R.D. 444	12
Parr v. *United States*, 351 U.S. 513	10

496784—59——1

Cases—Continued

	Page
Pennsylvania R. Co. v. *Kirkpatrick*, 203 F. 2d 149	11
Peterson, Ex parte, 253 U.S. 300	10, 14, 15, 16
Pierce v. *Brovig*, 16 F.R.D. 569	12
Roche v. *Evaporated Milk Association*, 319 U.S. 21	10
Sibbach v. *Wilson & Co.*, 312 U.S. 1	12
United States v. *Brandt*, 196 F. 2d 653	13
Whipple v. *Cumberland Cotton Co.*, 3 Story 84	15

Statutes:

Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, *et seq.*	5
Federal Tort Claims Act:	
28 U.S.C. 2401(b)	6

Miscellaneous:

1957 Annual Report of the American Bar Association:	
p. 184	13, 14
pp. 184–85	12
Barnet, *Compulsory Medical Examinations under the Federal Rules*, 41 Va. L. Rev. 1059, 1071–1072	12
Federal Rules of Civil Procedure:	
Rule 35	2, 12, 14, 15, 17
Rule 54(d)	3, 15, 16
Rule 83	4, 11
Local Rule of the United States District Court for the Eastern District of Pennsylvania adopted June 2, 1958	4, 14, 15–16
4 Moore, *Federal Practice:*	
¶ 26.37[4]	11
¶ 35.03	14
¶ 35.04	14
6 Moore, *Federal Practice:*	
¶ 54.70[5]	15
Notes of Advisory Committee on Rules of Civil Procedure to Rule 54, Subdivision (d)	16
Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 26	12–13
2 Wigmore, *Evidence:*	
Section 563	13
Section 563(3)(C)	13
9 Wigmore, *Evidence:*	
Section 2484	13

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 650

ARNOLD HANKINSON, PETITIONER

v.

HON. FRANCIS L. VAN DUSEN AND
HON. C. WILLIAM KRAFT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the District Court directing an impartial medical examination, and the order of the Court of Appeals denying petitioner's petition for writs of mandamus and prohibition are set forth at Pet. App. 1a–4a. No opinions were delivered by the courts below with respect to these orders.

JURISDICTION

The order of the Court of Appeals was entered on October 21, 1958. The petition for a writ of certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in denying petitioner's application for writs of mandamus or prohibition to annul a District Court order directing pretrial medical examinations of petitioner, the plaintiff in a personal injury action, by court-appointed physicians, and apportioning the costs of such examinations.

2. Whether the District Court lawfully promulgated a local rule which provided for (1) examinations of injured persons in personal injury cases by impartial medical experts selected by the judge from panels of physicians; and (2) apportionment of the experts' fees equally among the parties, unless otherwise directed.

3. Whether the District Court acted within its discretion in applying its rule in this case.

RULES INVOLVED

1. Rule 35, Federal Rules of Civil Procedure:

Physical and Mental Examination of Persons

(a) *Order for Examination.*—In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Findings.*

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written

report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

2. Rule 54(d), Federal Rules of Civil Procedure:

Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

3. Rule 83, Federal Rules of Civil Procedure:

> *Rules by District Courts*
>
> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. Local Rule of the United States District Court for the Eastern District of Pennsylvania, adopted June 2, 1958:

> RULE FOR MEDICAL EXAMINATION IN PERSONAL INJURY ACTIONS ADOPTED PURSUANT TO F.R. CIV. P. 83 AND SUPPLEMENTING F.R. CIV. P. 35
>
> A. In any personal injury case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing, if such hearing be requested by either counsel, order such examination and report. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with a committee appointed by the President of the Pennsylvania Bar Association and with the court.

Copies of the report of the examining physicians will be made available to all parties.

B. The compensation of the expert or experts shall be fixed by the judge ordering the examination and shall be paid equally by each party to the litigation unless such judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations.

C. If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party, but without compensation by any litigant.

STATEMENT

This action was brought by petitioner against the Pennsylvania Railroad Company on July 17, 1956, under the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, *et seq.* By order of the District Court on January 9, 1957, the United States was impleaded as a third-party defendant under the Federal Tort Claims Act.

In his complaint, petitioner alleged that while he was employed by the Pennsylvania Railroad, and as a result of the railroad's negligence, he sustained severe and permanent injuries to his legs, back and elsewhere, and a severe nervous shock. The accident occurred on July 29, 1955, in the railroad's Philadelphia station, when the rope on a mail-sack broke as petitioner pulled it, and he fell. Petitioner asserted that the railroad had negligently failed to provide a

safe place to work, safe equipment, or adequate inspection of mail sacks. Alleging great pain of body and mind, past and future medical expenses, and past and future impairment or destruction of earning capacity, he sought $100,000 damages.

In its third-party complaint against the United States, the Pennsylvania Railroad asserted that the negligence of post-office employees was the sole or concurrent cause of petitioner's injuries, specifically alleging the Government's use of a defective or damaged mail-sack. The railroad prayed judgment over against the United States in the amount of its adjudicated liability to petitioner, plus costs, expenses and counsel fees or, in the alternative, contribution in the amount of one-half its liability to petitioner. The United States denied liability, and pleaded the contributory negligence of petitioner as well as the primary, active, negligence of the railroad.

By an amended complaint filed November 21, 1957, petitioner increased his prayer for damages against the railroad to $150,000, and sought to state a claim against the United States under the Federal Tort Claims Act. On the Government's motion, the District Court (Kraft, J.) dismissed the Tort Claims Act complaint against the United States as barred by the applicable statute of limitations, 28 U.S.C. 2401(b). The opinion and order of dismissal were filed March 13, 1958, and are set forth in the Appendix, *infra*, pp. 20–23.

A local rule adopted by the District Court on June 2, 1958, "pursuant to F.R. Civ. P. 83 and supplementing F.R. Civ. P. 35", *supra*, pp 4–5, provides

for impartial medical examinations of injured persons in any personal injury case in which the judge is of the opinion that such examination "would be of material aid to the just determination of the case." The examination and report is to be made by physicians drawn from panels designated by the Pennsylvania Medical Society, after consultation with the court and with a committee appointed by the president of the Pennsylvania Bar Association. Under the rule, the judge is to fix the physicians' compensation, which shall be borne equally by the parties, unless otherwise ordered. The appointed physicians may be called to testify at trial by the parties or by the court, without additional compensation, and are subject to cross-examination by any party.

Pursuant to this rule, on October 1, 1958, the Pennsylvania Railroad moved for the examination of petitioner's back disability by a physician or physicians appointed from the court's panels of orthopedists, neurologists, or neurosurgeons, and an examination of petitioner's heart condition by a member or members of the panel of cardiologists. The motion (Appendix, *infra*, pp. 18–20) stated that petitioner had been examined and treated by physicians of his own choice and at the instigation of the railroad, and that diametrically opposed conclusions and had been reached with respect to two points: (1) whether petitioner had a herniated disc; and (2) whether a heart attack suffered by petitioner in October 1956, and a subsequent cardiac condition, were caused by the accident. In view of the conflict between the experts, the rail-

road alleged that impartial examinations and reviews of the medical history "would be of material aid to the just determination of the case."

By order entered October 9, 1958 (Pet. App. 1a–3a), the District Court (Van Dusen and Kraft, JJ.) appointed two impartial medical experts, and directed petitioner to submit himself to one for examination with respect to the "alleged 'ruptured intervertebral disc' ", and to the second regarding the "alleged 'traumatic heart attack' " and the connection between the accident and his present heart condition; the order also directed all parties to make available all prior medical reports and records. Finding that petitioner could not afford to pay one-half the experts' fees, the court directed that the Pennsylvania Railroad was to pay the entire amount, but that petitioner had to file a stipulation to pay one-half such fees to the railroad out of any amount recovered in this action; the railroad's payment and petitioner's stipulation were prerequisites to the receipt by each of the impartial medical reports.

On October 14, 1958, petitioner filed a petition for writs of mandamus and prohibition in the United States Court of Appeals for the Third Circuit, praying that the respondent judges be directed to annul the local rule of June 2, 1958 and the order in this case of October 9, 1958. Petitioner urged that the contemplated use of impartial medical examiners constituted a denial of his right to trial by jury. In addition, the imposition upon him of one-half the medical fees was challenged as a deprivation of property without due

process of law and in excess of the court's rule-making authority; the requirement that petitioner so stipulate as a prerequisite to receiving the medical reports was alleged to deny him trial by jury and to conflict with the Federal Rules of Civil Procedure.

On October 21, 1958, without awaiting the responses of the district judges and the parties to the litigation, the court below entered an order denying this petition (Pet. App. 4a).

ARGUMENT

While it did not itself seek the order for impartial medical examination, the United States as the third-party defendant may be subject to liability over and, therefore, has a substantial interest in a fair assessment of the damages sustained by the petitioner. Also, the United States has a continuing general interest in the trial of personal injury actions in the federal courts, because of the Federal Tort Claims Act and comparable statutes. For those reasons, we are filing a response to the petition for certiorari. We submit, first, that the order of the District Court, like other discovery orders, may not be challenged by way of a proceeding for mandamus or prohibition; considering solely that ground, the Court of Appeals' denial of the petition below was clearly proper. In any event, the District Court's order and the local rule are valid. What petitioner seeks to derogate as an unconstitutional infringement was no more than the implementation, by way of the local rule-making power, of the federal rules on pretrial discovery.

I

The effect of the District Court's challenged order is that petitioner will be required to submit to two examinations by impartial medical experts and to face the prospect that, at the trial, these physicians might be called upon to testify. Like other rulings regarding discovery of evidence before trial, or its admissibility at trial, the order of October 9, 1958, was interlocutory only. *Cogen* v. *United States*, 278 U.S. 221, 223–224; *Bowles* v. *Commercial Casualty Co.*, 107 F. 2d 169 (C.A. 4). Mandamus was properly denied, for its grant would have been "a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30.[1] "This is not a case where a court has exceeded or refused to exercise its jurisdiction * * * nor one where appellate review will be defeated if a writ does not issue * * *. *Parr* v. *United States*, 351 U.S. 513, 520; cf. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382–385. The summary denial below of the petition for mandamus or prohibition accords, therefore, with other rulings declining to use the pre-

[1] *Ex parte Peterson*, 253 U.S. 300, relied upon by petitioner, took jurisdiction over an original petition for mandamus in this Court which asserted that appointment of an auditor constituted a deprivation of trial by jury, but the Court thereupon rejected this view and denied the petition. As noted in *Roche* v. *Evaporated Milk Association*, 319 U.S. at 32, this case demonstrates the narrow office of mandamus. Furthermore, as we point out below, *Ex parte Peterson* supports the instant District Court action on the merits—*i.e.*, the use of court-appointed experts, and the apportionment of costs. See pp. 14, 16, *infra*.

rogative writs as a lever to pry into pretrial discovery proceedings. *E.g., Pennsylvania R. Co.* v. *Kirkpatrick*, 203 F. 2d 149 (C.A. 3); *Bank Line* v. *United States*, 163 F. 2d 133 (C.A. 2); 4 Moore, *Federal Practice* ¶26.37[4].

Nor does *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, lend support to petitioner's application. That case presented the "exceptional circumstances" of an "abdication of the judicial function" by reference to a master for trial despite previous admonitions of the Court of Appeals (*id.* at 256, 260), rather than a routine matter of pretrial discovery in anticipation of a trial before the court. Furthermore, in *Howes Leather Co.*, the Court of Appeals issued mandamus and this Court considered whether such action was within the lower court's power and a proper exercise of discretion (352 U.S. at 254–260); here, the court below has, to the contrary, refused to grant the writs prayed for. In view of the discretionary nature of the relief denied, no further review is called for at this time.

II

Furthermore, petitioner has fallen far short of presenting a "clear and indisputable" showing,[2] necessary for issuance of the extraordinary writs, that an error was committed by the District Court in promulgating its local rule of June 2, 1958, or in entering the particular order in this case.

1. (*a*). Rule 83 of the Federal Rules of Civil Procedure, *supra*, p. 4, authorizes the adoption by each District Court of "rules governing its practice not incon-

[2] *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384.

sistent with these rules." The local rule here challenged was adopted to supplement Rule 35 concerning pretrial physical and mental examinations of parties, *supra*, pp. 2–3. Under Rule 35, sustained by this Court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, the District Court may order a party to submit to a physical examination by a physician and may specify "the time, place, manner, conditions, and scope of the examination *and the person or persons by whom it is to be made.*" (Emphasis added.) *Sibbach* v. *Wilson & Co.* involved an order for examination "by one or more physicians appointed by the court" (312 U.S. at 6), and several reported cases show courts independently choosing doctors, at least when the parties failed to agree. *Pierce* v. *Brovig*, 16 F.R.D. 569, 570 (S.D.N.Y.); *The Italia*, 27 F. Supp. 785 (E.D.N.Y.); *Leach* v. *Greif Bros. Cooperage Corp.*, 2 F.R.D. 444 (S.D. Miss.). See Barnet, *Compulsory Medical Examinations under the Federal Rules*, 41 Va. L. Rev. 1059, 1071–1072. The use of impartial experts selected by the court, rather than those proffered by the parties, is clearly authorized by the terms of Rule 35.

The District Court for the Eastern District of Pennsylvania, in its local rule, sought to put on a regular basis such designations previously made *ad hoc*, and directed the establishment of a panel of medical experts. A similar practice for personal injury cases has been utilized in several state systems, and has been vigorously recommended by several authorities. 1957 *Annual Report of the American Bar Association*, pp. 184–185;[3] Peck, *Impartial Medical Testimony*, 22

[3] The American Bar Association has adopted (*1957 Annual Report*, p. 184):

* * * a national program, to be implemented at the local

F.R.D. 21, 26; 2 Wigmore, *Evidence,* Sec. 563(3)(C).

(*b*). No constitutional questions are presented by this practice, or by the use of the impartial experts at a trial. The trial court has the undoubted power to call and examine witnesses in order to elicit evidence which will assist a jury in its understanding of the case. *Glasser* v. *United States,* 315 U.S. 60, 82; Frankfurter, J., dissenting, in part, in *Johnson* v. *United States,* 333 U.S. 46, 54–55; *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.,* 143 F. 2d 826, 828–829 (C.A. 5); see *United States* v. *Brandt,* 196 F. 2d 653, 655 (C.A. 2); 9 Wigmore, *Evidence,* Sec. 2484. The presentation of impartial medical testimony by the courts' own witnesses is included in this authority. 9 Wigmore, *Evidence,* Sec. 2484; 2 *id.,* Sec. 563; see *Dinsel* v. *Pennsylvania Railroad Com-*

---

level, of fostering the creation and employment of panels of impartial medical experts, under court aegis, in the pre-trial consideration and trial of personal injury cases especially in those communities where there is a volume of personal injury litigation in the courts and where there is a sufficient number of qualified doctors available to constitute a panel * * *

This program was recommended by the A.B.A.'s Section on Judicial Administration as having "the following wholesome and beneficial results: (1) It improves the process of finding the medical facts, vastly increasing the likelihood of reaching the right result. (2) It serves to relieve court congestion by bringing about the settlement of many cases which would otherwise have to be tried and which by their nature would entail lengthy trials. (3) It has a prophylactic effect upon the formulation and presentation of medical testimony in court. (4) The modest cost involved in the payment of independent experts is a positive economy in effecting a large saving in courts operations" (as quoted in Peck, *Impartial Medical Testimony,* 22 F.R.D. at 26).

pany, 144 F. Supp. 880, 881 (W.D. Pa.). As with experts presented by the parties, this practice does not trench upon the right to trial by jury, but provides further evidence for the jury's consideration. This Court has held that, even if a report of a court's expert would be accepted by the jury as *prima facie* correct, the constitutional right of jury trial was fully preserved by the parties' right to call, examine, and cross-examine any witnesses desired. *Ex parte Peterson*, 258 U.S. 300, 310–312.

(*c*). The order of October 9, 1958, directing medical examinations of petitioner was an appropriate exercise of the District Court's discretion under Rule 35 and the local rule. Rule 35 requires a showing that "the mental or physical condition of a party is in controversy", and "good cause shown". In this case, there are no problems as to the materiality of the evidence sought; and countervailing conditions of pain, discomfort, or danger are likewise not present. See 4 Moore, *Federal Practice*, ¶¶35.03, 35.04. Furthermore, there is nothing to support petitioner's contention that "good cause" under Rule 35 must be limited to the clarification of complex issues, like the auditor's report in *Ex parte Peterson, supra*. A medical examination has quite different objectives; as urged by the American Bar Association (footnote 3, *supra*), one of its foremost benefits is the resolution of, or a "prophylactic effect" upon, a conflict between the parties' own experts. In these circumstances, an impartial examination would "be of material aid to the just determination of the case", within the terms of the District Court's rule.

2. (*a*). Just as the District Court established by local rule a regular basis for impartial examinations, so it set forth its practice regarding the apportionment of the costs of such examination. Under Rule 35, the payment of experts' fees is properly one of the "conditions" of the examination which the court may specify.

The general provision governing costs in civil cases is in Rule 54(d), *supra*, p. 3, which states that, absent specific statute or federal rule, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." On numerous occasions, district courts have "otherwise direct[ed]" and taxed certain items against the prevailing party or apportioned them between the parties. 6 Moore, *Federal Practice* ¶54.70[5]. It has been found particularly appropriate to divide between the parties the costs of an auditor, master, or other person called upon by the court itself to aid in resolution of the case. *E.g.*, *Dyker Bldg. Co.* v. *United States*, 182 F. 2d 85, 89 (C.A.D.C.); *Bowen Motor Coaches* v. *New York Casualty Co.*, 139 F. 2d 332, 334 (C.A. 5). Cf. *Ex parte Peterson*, 253 U.S. 300, 315–316; Frankfurter, J., dissenting in part, in *Johnson* v. *United States*, 333 U.S. 46, 54; *Whipple* v. *Cumberland Cotton Co.*, 3 Story 84, 86 (C.C. Me., Story, J. at circuit).

The impartial medical examination here involved is another appropriate exercise of such discretion. And instead of leaving the matter to *ad hoc* determination, the District Court below properly acted under Rule 83 to announce its policy in a local rule—that com-

pensation of the impartial medical experts "shall be paid equally by each party to the litigation unless [the] judge, in his discretion, orders payment to be made otherwise in order to meet special factual situations". *Supra*, p. 5.

(*b*). Petitioner relies upon *Ex parte Peterson*, 253 U.S. 300, for the proposition that costs may not be taxed against a prevailing party in actions at law. But *Peterson* demonstrates the contrary. While the opinion in that case followed the common law rule, it pointed out that discretionary apportionment of costs or their assessment against a prevailing party was permitted in equity proceedings, and "[t]he advantages of such a flexible rule are obvious." 253 U.S. at 317. The proviso of Rule 54(d), *supra*, p. 3 was drafted in order to repudiate the common law rule followed perforce in *Peterson*, and relied upon by petitioner. *Dyke Bldg. Co.* v. *United States*, 182 F. 2d 85, 89 (C.A.D.C.); Notes of Advisory Committee on Rules to Rule 54, Subdivision (d). There is no doubt, therefore, that apportionment is now possible, and that the local rule here challenged was within the power of the District Court.

(*c*). Finally, the particular application of the local rule as to costs in the order of October 9, 1958 was proper. As already indicated, *supra*, p. 15, division between the parties of the costs of a court-appointed expert is a traditional and reasonable method. It was proper to limit contribution to plaintiff and defendant, the petitioner and the railroad, and to exclude the United States, which is subject only to third-party liability, and was not directly involved in the rail-

road's motion. The District Court's fairness to petitioner is shown by the provision of the order which does not require him to contribute anything unless he prevails in this action, and then only from the amount of such recovery.

Petitioner also contends that Rule 35 precludes the court from requiring him now to stipulate that he would ultimately pay his one-half share. But if petitioner is correct that he is entitled to the medical report without any agreement to pay a share, no damage can be sustained by him until the costs are assessed; at that time, he can contest the assessment and show that the stipulation was involuntarily imposed upon him. For that reason, this point does not warrant consideration at the present stage.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
LIONEL KESTENBAUM,
Attorneys.

FEBRUARY 1959.

APPENDIX

Motion of Pennsylvania Railroad For Impartial Medical Examinations, Filed October 1, 1958

Defendant, The Pennsylvania Railroad Company, requests the Court, in accordance with its local rule, to order medical examinations and reports thereon by court appointed physicians, and in support of its motion defendant states the following facts:

1. This is an action under the Federal Employers' Liability Act, in which defendant, The Pennsylvania Railroad Company, joined the United States as a third-party defendant under the Federal Tort Claims Act.

2. Plaintiff was on or about July 29, 1955, the time of the alleged accident, an employee of the defendant railroad assigned to duties involving the handling of government mail sacks at one of defendant's stations. In the course of his duties he allegedly fell and suffered a back injury.

3. Since his injury he has undergone medical examinations and treatment at the instigation of the defendant railroad, and he has been examined and treated on numerous occasions by physicians of his own choice.

4. Some months subsequent to the alleged accident plaintiff suffered a heart attack.

5. Defendant is led to believe that at the trial plaintiff will make, perhaps among others, two medical claims:

(a) That the accident caused a so-called "ruptured intervertebral disc"; and
(b) That the accident caused his heart attack.

6. With respect to the "disc" claim, the most recent report which defendant has received from plaintiff's attorney is dated April 4, 1957, and is by Oscar Corn, M.D., in which the doctor says in part:

> Whether the myelogram is positive or negative, this patient must be considered to have a herniated disc.

The most recent report from an examiner for the defendant railroad is dated December 12, 1957 and is by Richard Kaplan, M.D., an orthopedist, in which he states in part:

> I certainly do not feel that he has any evidence of any herniated disc.

7. With respect to the alleged "traumatic heart attack", the most recent report which defendant has received from plaintiff's attorney is dated November 29, 1957 and is by Samuel Bellet, M.D., a cardiologist, in which the doctor says in part,

> It is my opinion that the accident sustained on July 30, 1955 contributed materially to his present condition.

The most recent report from an examiner for the defendant railroad is dated July 7, 1958 and is by W. D. Stroud, M.D., a cardiologist, in which he states in part,

> In my opinion, there is *no possible connection* between his accident on July 30, 1955—with his subsequent orthopedic disabilities—and his past and present heart condition.

8. In view of the diametrically opposed position taken by plaintiff's and defendant's doctors, impartial examinations of plaintiff and impartial reviews of the past medical history would be of material aid to the just determination of the case.

9. This case is No. 79 on the current jury trial list and may be reached for trial during the three weeks commencing October 13, 1958.

Wherefore, the Court is requested to appoint either a member or members of a panel of examining physicians to examine plaintiff relative to this alleged back disability (from either the panel of orthopedists, or of neurologists or of neurosurgeons) and to appoint a member or members of a panel to examine plaintiff pertaining to his heart condition (from the panel of cardiologists).

(S) F. Hastings Griffin, Jr.
F. HASTINGS GRIFFIN, JR.
Attorney for Defendant,
The Pennsylvania Railroad Company.

District Court Opinion Sustaining United States' Motion To Dismiss Amended Complaint, Filed March 13, 1958

The United States, one of two defendants in this case, moves to dismiss the amended complaint on the ground that the pleading itself discloses that plaintiff's claim against the government is barred by the statute of limitations.

Plaintiff's original complaint, filed July 17, 1956, sought recovery only against the Pennsylvania Railroad Co. under the Federal Employers' Liability Act for an injury suffered on July 29, 1955. The railroad answered on August 10, 1956 and, some months later, joined the United States as third-party defendant. The third-party complaint was served January 10, 1957

and the government filed its answer thereto on March 10, 1957.

Subsequently, on November 21, 1957, the plaintiff, disregarding the provisions of F.R.C.P. 15(a), filed his amended complaint without leave of court. In this pleading the United States was, for the first time, named as an original party defendant. The amended complaint continued the railroad as a defendant, substantially repeated the substantive averments of the original complaint and purported to state a cause of action against the United States under the Federal Tort Claims Act, 28 U.S.C.A. 1346(b).

Plaintiff first challenges the propriety of the government's motion to dismiss. He points out that F.R.C.P. 12(b), which enumerates certain defenses which, at the defendant's option, may be made by motion, makes no reference to a statute of limitations defense. Plaintiff also insists that F.R.C.P. 8(c) requires this defense to be pleaded affirmatively in a responsive pleading. Usually this is so. However, where the complaint itself reveals the existence of a statute of limitations defense, that defense may be raised by a motion to dismiss. *Wagner* v. *N.Y., Ont. & West. Ry.*, 146 F. Supp. 926 (M.D. Pa. 1956); *Delman* v. *Federal Products*, 136 F. Supp. 241 (D.R.I. 1955); *Shandelman* v. *Shuman*, 92 F. Supp. 334 (E.D. Pa. 1950).[1]

[1] For other cases supporting this rule, see: *Rohner* v. *Union Pacific R. Co.*, 225 F. 2d 272 (10th Cir. 1955); *Kincheloe* v. *Farmer*, 214 F. 2d 604 (7th Cir. 1954); *Taylor* v. *Houston*, 211 F. 2d 427 (D.C. Cir. 1954); *A. G. Reeves Construction Co.* v. *Weiss*, 119 F. 2d 472 (6th Cir. 1941); *Harrington* v. *Yellin*, 25 Fed. Rules Serv. 12 e. 22, Case 1 (1958); *Lomax* v.

In pertinent part, the applicable statute (28 U.S. C.A. § 2401(b)) provides:

> A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues * * *.

The plaintiff next insists that, because the defendant railroad impleaded the government as a third-party defendant within two years from the time plaintiff's cause of action accrued, the statute of limitations was tolled. This is an ingenious but untenable contention. *Carlisle* v. *Monongahela Ry. Co.*, 16 F. R. D. 426 (W. D. Pa. 1954); *Horan* v. *Pope & Talbot, Inc.*, 119 F. Supp. 711 (E.D. Pa. 1953); *Sommer* v. *Scranton-Spring Brook Water Service Co.*, 3 F.R.D. 27 (M.D. Pa. 1943). The amended complaint *began* the plaintiff's action on *his* claim against the United States too late. It is of no avail to the plaintiff that the railroad began its action on *its* claim against the government in time.

This conclusion makes unnecessary any disposition of the government's second contention that the amended complaint should be stricken because it was filed without leave of court in violation of F.R.C.P. 15(a), and thus deprived the government of the opportunity to raise the question in limine by objec-

---

United States, 155 F. Supp. 354 (E.D. Pa. 1957); *O'Malley* v. *Wyoming National Bank*, 15 F.R.D. 457 (M.D. Pa. 1954); *Magnotta* v. *Leonard*, 16 Fed. Rules Serv. 12b.325, Case 1 (M.D. Pa. 1952); *Burrell* v. *La Follette Coach Lines*, 97 F. Supp. 279 (E.D. Tenn. 1951); *Stanley* v. *Bird*, 85 F. Supp. 358 (W.D. Ky. 1949); *Berry* v. *Heller*, 79 F. Supp. 476 (E.D. Pa. 1948); *Gerard* v. *Mercer*, 62 F. Supp. 28 (D. Mont. 1945); *Callahan* v. *Chesapeake & Ohio R. Co.*, 40 F. Supp. 353 (E.D. Ky. 1941); *Wilson* v. *Shores-Mueller Co.*, 40 F. Supp. 729 (N.D. Iowa 1941); *Cramer* v. *Aluminum Cooking Utensil Co.*, 4 Fed. Rules Serv. 12b. 325, Case 4 (1941).

tion to the allowance of an amendment which sought to bring in a new party defendant in whose favor the statute of limitations had already run.

District Court Order Dismissing Amended Complaint Against United States, Filed March 13, 1958

Now, March 13, 1958, the motion of the United States of America is granted and, as to it, the amended complaint is dismissed.

(S) C. WILLIAM KRAFT, JR., *Judge.*

U. S. GOVERNMENT PRINTING OFFICE: 1959